

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

EQUITY FINANCIAL GROUP, LLC,
et al.,

Defendants.

Civil No. 04-1512 (RBK)

ORDER

This matter comes before the Court upon the motion of Cirino M. Bruno, Esquire, of the law firm Gusrae, Kaplan & Bruno, PLLC (hereafter "Gusrae"), counsel for Defendants Tech Traders, Inc., Tech Traders, Ltd., Magnum Capital Investments, Ltd., Magnum Investments, Ltd. (collectively the "Tech Traders Entities") and Coyt E. Murray (hereafter "Murray"), seeking to withdraw as counsel for the Tech Traders Entities. The Court has considered the submissions of Defendants and the opposition thereto, and for the reasons set forth below and for good cause shown, the Court will deny the motion without prejudice.

Counsel for Defendants states that the firm's representation of both the Tech Traders Entities and Murray constitutes a conflict of interest under the New Jersey Rules of Professional Conduct. See Declaration of Cirino M. Bruno, Esquire, in Support of GKB's

Motion to Withdraw as Counsel (hereafter "Bruno Decl.") at ¶¶ 5, 9. Specifically, Defendants' counsel states that its identification and preparation of corporate designees for deposition pursuant to Fed.R.Civ.P. 30(b)(6), as well as "the identification and analysis of corporate events which involve the potential for fact patterns that are inconsistent with Mr. Murray's interests," present conflict issues that necessitate withdrawal as counsel for the Tech Traders Entities. Id. at ¶ 6(a)-(b). Gusrae contends that Murray asserted his Fifth Amendment right at his deposition on December 9, 2004, and Gusrae's representation of the Tech Traders Entities in producing a corporate designee would "negatively impact upon Murray's defense in this matter." See Declaration of Cirino M. Bruno, Esquire, in Reply to the Opposition of the Commodity Futures Trading Commission and the Equity Receiver to, and in Further Support of, the Motion of Gusrae, Kaplan & Bruno, PLLC to Withdraw as Counsel for the Tech Traders Entities (hereafter "Bruno Reply Decl.") at ¶ 6. Counsel further asserts that because Stephen Bobo has been appointed the Equity Receiver of the Tech Traders Entities and Murray, "a question exists as to whom [Gusrae] actively answers, Mr. Murray or Mr. Bobo" because "the Equity Receiver is the person who controls the corporate entities" and thus these parties allegedly represent conflicting interests. Bruno Decl. at ¶ 7; Bruno Reply Decl. at ¶ 7. Gusrae states that it recognized the conflict of interest, which was purportedly not previously apparent, after the production of thousands of pages of documents during discovery. Bruno Reply Decl. at ¶¶ 4-5. However, Gusrae

avers that it is unable to further articulate the precise conflict "without negatively impacting upon its defense of Murray." Id. at ¶ 5. Finally, counsel requests withdrawal from representation of the Tech Traders Entities in light of this purported conflict because Gusrae's "primary contact" is Murray. Bruno Cert. at ¶ 8.

Both Plaintiff, Commodity Futures Trading Commission (hereafter "CFTC"), and the Equity Receiver, Stephen T. Bobo (hereafter "Bobo"), oppose Gusrae's motion to withdraw. CFTC asserts that Gusrae has failed to sufficiently articulate a conflict of interest between the Tech Traders and Murray. See CFTC's Response to Gusrae Kaplan & Bruno, PLLC's Motion to Withdraw as Counsel for the Tech Traders Entities (hereafter "CFTC Brief") at ¶ 1. CFTC contends that Gusrae entered an appearance on behalf of Tech Traders, Inc., a corporation allegedly controlled by Murray, while also representing Murray when his deposition was noticed before becoming a party to the present litigation. See CFTC Brief at ¶ 2. Accordingly, CFTC states, Gusrae represented both a corporation purportedly controlled by Murray and Murray individually but did not assert a conflict until several months later. Id. CFTC further alleges that Gusrae filed the present motion to avoid producing corporate representatives for a deposition noticed pursuant to Fed.R.Civ.P. 30(b)(6). Id. at ¶ 3. CFTC contends that such failure to produce a corporate representative has prejudiced CFTC's ability to prosecute this case. Id. Finally, CFTC states that the role of the Equity Receiver is to marshal the assets of the receivership estate and to

pay out the claims of investors and other creditors, and the Equity Receiver does not defend substantive claims against defendants. Id. at ¶ 5. Bobo presents similar arguments in opposition to Gusrae's motion. Bobo asserts that at the time Gusrae entered its appearance on behalf of Tech Traders, Inc. and Coyt E. Murray in April 2004, it was foreseeable that Coyt E. Murray and the other Tech Traders Entities might be added as defendants. See Objection of Equity Receiver to Motion of Gusrae, Kaplan & Bruno, PLLC to Withdraw as Counsel for the Tech Traders' Entities (hereafter "Bobo Brief") at 2. Bobo further states that Gusrae's "vague" claim that a conflict exists is linked to CFTC's attempt to depose corporate representatives of the Tech Traders Entities, as Murray would "presumably prefer that the scheduled depositions not take place" and the Tech Traders Entities are obligated under Rule 30(b)(6) to produce such persons for deposition. Id. Bobo contends that withdrawal of Gusrae at this time would interfere with the depositions of the Tech Traders Entities' representatives. Id. Bobo also states that the Equity Receiver has no authority to "take over the defense of this case on behalf of the entities" but only acts to marshal the assets of the receivership estate and to recommend a means of distributing the funds to the parties entitled to them. Id. at 3. Finally, in the event this Court permits withdrawal of Gusrae, Bobo requests that any issue regarding the Tech Traders Entities' funds that Gusrae received as a retainer be preserved and that Gusrae provide an accounting regarding the funds to ensure that they have not been used primarily to represent the

interests of Murray.¹ Id.

In deciding this motion, the Court is guided by Rule 1.16(b) of the Rules of Professional Conduct ("R.P.C."), as well as Local Civil Rule 102.1.² R.P.C. 1.16(b) provides:

[e]xcept as stated in paragraph (c), a lawyer may withdraw from representing a client if: (1) withdrawal can be accomplished without material adverse effect on the interests of the client; (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; (3) the client has used the lawyer's services to perpetrate a crime or fraud; (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or (7) other good cause for withdrawal exists.

R.P.C. 1.16(b). L.Civ.R. 102.1 further provides that "[u]nless other counsel is substituted, no attorney may withdraw an appearance except by leave of Court. After a case has been first set for trial, substitution and withdrawal shall not be permitted except by leave of Court." L.Civ.R. 102.1. The decision of whether to permit counsel to withdraw is left to the sound discretion of the Court. See Rusinow v. Kamara, 920 F. Supp. 69,

1. Because Gusrae's motion to withdraw is denied as set forth herein, the Court need not address this issue at this time.

2. The Rules of the Professional Conduct ("R.P.C.") of the American Bar Association "as revised by the New Jersey Supreme Court shall govern the conduct of the members of the bar admitted to practice in this Court, subject to such modifications as may be required or permitted by Federal statute, regulation, court rule or decision of law." L. Civ. R. 103.1(a).

71 (D.N.J. 1996).

R.P.C. 1.16 does not automatically result in withdrawal. Rather, R.P.C. 1.16(c) limits withdrawal under R.P.C. 1.16(a) and (b) and leaves the determination of withdrawal within the purview of the presiding Court. Consequently, a lawyer shall continue representation of a client when required to do so by rule or when ordered to do so by a tribunal, "notwithstanding good cause for terminating the representation." R.P.C. 1.16(c); see also Rusinow, 920 F. Supp. at 70. When evaluating a motion to withdraw, the Court may consider four principal criteria: 1) the reasons why withdrawal is sought; 2) the prejudice withdrawal may cause to other litigants; 3) the harm withdrawal might cause to the administration of justice; and 4) the degree to which withdrawal will delay the resolution of a case. Rusinow, 920 F. Supp. at 70; see also Haines v. Liggett Group, Inc., 814 F. Supp. 414, 423 (D.N.J. 1993).

Counsel seeks to withdraw due to a purported conflict of interest between co-defendants represented by the firm. Having reviewed the papers, the Court notes that Gusrae has not sufficiently articulated a conflict of interest between the Tech Traders Entities and Murray, and thus counsel has not averred in its moving papers specific information for the Court to make a finding that good cause exists for withdrawal under Rule 1.16(b). Similarly, the Court rejects Gusrae's contention that Bobo's appointment as an equity receiver constitutes or creates a conflict that warrants withdrawal by Gusrae of its representation of the

Tech Traders Entities. As noted by Bobo, Gusrae cites no authority for the proposition that the equity receiver is responsible for defending the merits of this case and there is no authority in the Order Appointing Receiver dated April 1, 2004, as modified by the consent preliminary injunction dated August 24, 2004, that the equity receiver shall take over the defense of this litigation. See Bobo Brief at 3.

However, even assuming that Gusrae has demonstrated good cause for withdrawal under R.P.C. 1.16(b), the Court finds that other equitable considerations weigh against withdrawal at this time. In this regard, Gusrae has not indicated that substitute counsel is available for the Tech Traders Entities. The Court notes that the Tech Traders Entities are not permitted to represent themselves, as the Third Circuit has held that corporations must be represented by licensed counsel. See United States v. Cocivera, 104 F.3d 566, 572 (3d Cir. 1996), cert. denied 520 U.S. 1248 (1997); Simbraw, Inc. v. United States, 367 F.2d 373, 374-75 (3d Cir. 1966) ("a corporation can do no act except through its agents and . . . such agents representing the corporation in Court must be attorneys at law[.]") (quoting MacNeil v. Hearst Corporation, 160 F. Supp. 157 (D. Del. 1958)). In addition, although Gusrae has stated that Murray consents to the proposed withdrawal, there is no indication that the Tech Traders Entities consent to the proposed withdrawal or, assuming withdrawal is permitted, to Gusrae continuing to represent Murray despite the alleged conflict. While certain conflicts of interest are waivable, see R.P.C. 1.7, 1.8, and 1.9,

generally "an attorney who has represented two clients whose interests become adverse [is required] to abstain from representing either of them." Montgomery Academy v. Kohn, 82 F. Supp. 2d 312, 316 (D.N.J. 1999) (citing De Bolt v. Parker, 243 N.J. Super. 471, 484, 560 A.2d 1323 (Law Div. 1988)). Thus, Gusrae cannot select which client it wishes to represent, because to the extent that an actual conflict exists Gusrae would be precluded from representing the Tech Traders Entities or Murray absent a demonstration that the conflict is waivable and that a knowing proper waiver has been obtained from the clients in accordance with the Rules of Professional Conduct.

CONSEQUENTLY, for the reasons set forth above and for good cause shown:

IT IS on this 31st day of January 2005,

ORDERED that the motion of Defendants' counsel, Gusrae, Kaplan & Bruno, PLLC, to withdraw from representation of the Tech Traders Entities shall be, and hereby is, **DENIED without prejudice.**

s/ Ann Marie Donio
ANN MARIE DONIO
UNITED STATES MAGISTRATE JUDGE

cc: Hon. Robert B. Kugler